(6)

No. 88-1434



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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**ELIZABETH DOLE, SECRETARY OF LABOR,**
***et al., Petitioners,***

**v.**

**UNITED STEELWORKERS OF AMERICA,**
***et al., Respondents.***

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## RESPONDENT PUBLIC CITIZEN'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Contrary to petitioners' claim, this case presents two distinct questions for review. The only question on which petitioners seek review, Question 2 below (as restated by respondent), can be reached only if the Court resolves Question 1 in petitioners' favor:

1. May a federal agency, which is subject to a final court order directing it to complete rulemaking by a date certain, rely on the Paperwork Reduction Act to disobey that order by withdrawing provisions of the final rule after the expiration of the court-imposed deadline?

2. Does the Paperwork Reduction Act permit the Office of Management and Budget to override the substantive judgment of an Executive Branch agency made during a rulemaking proceeding that employers must provide their workers with information about work-place hazards, where such information will never be submitted to any federal agency?

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Respondent Public Citizen submits this opposition to supplement in two respects the more comprehensive opposition filed by respondents United Steelworkers of America, AFL-CIO, and the Building and Construction Trades Department, AFL-CIO ("Steelworkers") which Public Citizen supports in full.

First, respondent demonstrates that the question on which petitioners seek review cannot be reached unless this Court rules that the authority of federal courts to set a deadline for agency action is limited by the Paperwork Reduction Act of 1980 ("PRA"). 44 U.S.C. §§ 3501 *et seq*. Second, we address the flaws in petitioners' contention that the ruling below significantly impairs the power of the Office of Management and Budget ("OMB") to review agency information collection and dissemination requirements.*

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* Respondent Public Citizen adopts in full the opposition filed by the Steelworkers in *Associated General Contractors of America v. OSHA*, No. 88-1070, *Associated Builders & Contractors v. OSHA*, No. 88-1075, and *National Grain and Feed Ass'n v. OSHA*, No. 88-1385, and will not file a separate opposition to those petitions.

1. Petitioners are incorrect in suggesting that their petition presents only a single question for review. Petitioners acknowledge that the "question presented . . . arises in the context of a contempt action against the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health." Pet. at I. But they never address the impact of the contempt proceeding on their petition.

Yet it is precisely because this case arises in the context of a contempt action that the petition does not cleanly present the question on which petitioners seek certiorari. In determining that OMB's assertion of authority was improper in this case, the Third Circuit explicitly rested its judgment on two entirely separate grounds: its reading of the information collection provisions of the PRA *and* its finding that petitioners had violated the court's prior orders by withdrawing parts of the revised Hazard Communication Standard ("HCS") *after* the sixty-day deadline had elapsed. Pet. App. at 12a-13a. Thus, as an independent and alternative basis for its judgment, the Third Circuit held (*id.*) that the "[w]ithdrawal of the provisions disapproved by OMB was . . . inconsistent with" the court's prior orders, and, for that reason, "relief by motion is appropriate" under the All Writs Act, 28 U.S.C. § 1651(a), and the Administrative Procedure Act, which empowers courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

Although petitioners have ignored this alternative ground for the court's judgment, it plainly erects a major obstacle to review of the question on which petitioners seek certiorari. In order to address the statutory question under the PRA, this Court will first have to resolve the more fundamental question: may a federal agency, which is subject to a final court order directing it to complete rulemaking by a date certain, rely on the Paperwork Reduction Act to disobey that order by withdrawing provisions of the final rule after the expiration of the



court-imposed deadline?

Thus, to reach the statutory question presented by petitioners, the Court would first have to conclude that the PRA limits the authority of federal courts to set final deadlines for agency action. But the PRA itself dictates the opposite result. It provides that OMB's authority under the PRA "shall be exercised consistent with applicable law," 44 U.S.C. § 3504(a), which presumably includes rulings and orders issued by federal judges. Moreover, although courts are generally hesitant to impose fixed deadlines on agencies, *e.g., Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983); *Oil, Chemical & Atomic Workers Int'l Union v. Zegeer*, 768 F.2d 1480, 1487 (D.C. Cir. 1985), they have done so in egregious cases like this one. *See, e.g., Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 633 (D.C. Cir.), *vacated as moot*, 817 F.2d 890 (1987). As the D.C. Circuit recently observed, "[a]t some point, we must [be able to] lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough." *Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987). Unless this Court is prepared to rule that the PRA somehow overrides a federal court's power to "let an agency know" when "enough is enough" by setting a final, enforceable deadline for agency action, then the question on which petitioners seek review cannot determine the outcome of this case.

Finally, if the PRA creates the kinds of rights and obligations asserted by petitioners, the time and place for petitioners to have raised the question of OMB review under the PRA was when the Third Circuit issued its August 24, 1987 ruling setting a sixty-day deadline, so that, at the very least, the court could have taken the PRA into account in both the substance of its order and in fashioning the deadline that it set. But petitioners did no such thing; nor did they seek this Court's review. In short, it is too late to claim that the PRA has such a sweeping role, particularly given the PRA's own built-in limitation that it must be exercised

in a manner that is consistent with other laws, such as the Occupational Safety and Health Act, the Administrative Procedure Act, and the orders of federal courts. *See* 44 U.S.C. § 3504(a).

2. As the Steelworkers' Opposition explains, the Third Circuit's interpretation of the Paperwork Reduction Act is correct, and there is no reason why the Court should review it. There is, however, one additional factor that weighs heavily against review.

Despite the statistics cited by petitioners regarding the seemingly ubiquitous information collection requirements that the federal government imposes on Americans, *see* Pet. at 17-18, insofar as respondent is aware, this case is the first ever to interpret the information collection provisions of the PRA. 44 U.S.C. § 3504(c)(1) and (2). Petitioners nowhere explain why there has been such a dearth of litigation over such a pervasive and intrusive federal requirement. The answer, however, is important in understanding the flaws in petitioners' arguments about the need for this Court's intervention.

Petitioners' principal argument in favor of review is that the decision below will "effectively invalidate OMB's authority to review a wide range of other essentially indistinguishable agency information collection activities." Pet. at 17. This argument is specious. Contrary to the petitioners' suggestion, OMB's power under the PRA cannot be examined in isolation. Entirely aside from OMB's responsibilities under the PRA, OMB has sweeping authority under Executive Orders 12,291 and 12,498 to supervise comprehensively the development of any regulatory action that imposes a paperwork requirement — authority wholly unaffected by the Third Circuit's ruling.

Had this case not arisen in the context of a contempt proceeding, where petitioners were required by a valid court order to complete rulemaking within sixty days, OMB would have had ample opportunity to target what it believed to be the offending



provisions of the revised HCS under either or both Executive Orders. In the ordinary case, OMB would have raised its objections well before the publication of a proposed regulation — which is when OMB's responsibilities under the PRA first arise. *See* 44 U.S.C. § 3504(h). But this is an extraordinary case. As a result of the Secretary of Labor's egregious delay and the Third Circuit's order requiring the issuance of a final rule within sixty days, OMB had little opportunity to review the agency's rule under the Executive Orders. Nor could OMB exercise its powers under PRA to disapprove provisions of the agency's rule *after* the sixty day deadline imposed by the court had elapsed. Thus, the ruling below is the product of a highly unusual confluence of events and will have little or no impact on either OMB's ability to review agency actions affecting paperwork collection or dissemination, or subsequent litigation.

As a general rule, OMB's first review takes place when the agency's regulatory action is still inchoate. Thus, under Executive Order 12,498, all executive branch agencies — including the Department of Labor — must secure OMB's approval before they may place any regulatory initiative, including those involving information collection or dissemination, on its "regulatory agenda". 50 Fed. Reg. 1036 (1985), *reprinted as note to* 5 U.S.C.A. § 601, at 296 (Supp. 1988). In reviewing an agency's proposed regulatory program, OMB considers whether the agency's program is "consistent with the Administration's regulatory principles," § 2(b), and in keeping with "the regulatory principles stated in Section 2 of Executive Order 12291," § 3(d), which, as discussed more fully below, require an agency to justify its regulatory actions under strict cost/benefit criteria. If OMB determines that any part of the agency's draft regulatory program does not pass muster, the agency has the option of either revising it to meet OMB's objections, or invoking the procedure set forth in § 3(a)(ii), which provides for review "by the President or by such appropriate Cabinet Council or other forum as the

President may designate."

OMB's regulatory review function does not end once it allows an agency to start down the rulemaking path. Executive Order 12,291 was issued by President Reagan "in order to reduce the burdens of existing and future regulations" and "minimize duplication and conflict of regulations, and insure well-reasoned regulations." 46 Fed. Reg. 12193 (1981), 3 C.F.R. § 127 (1981), *reprinted as note to* 5 U.S.C.A. § 601, at 292 (Supp. 1988). The Order directs OMB to review an agency's rulemaking efforts, including those relating to information collection and dissemination, on at least two other occasions: first, when the agency is ready to publish a notice of proposed rulemaking, and second, when the agency is ready to publish its final rule. In conducting this review, OMB's mission is to ensure consistency with the principles articulated in the Order, including the requirements that:

> ( Administrative decisions shall be based on adequate information concerning the need for and consequences of proposed government action;
>
> (b) Regulatory action shall not be undertaken unless the potential benefits to society for the regulations outweigh the potential costs to society;
>
> (c) Regulatory objectives shall be chosen to maximize the net benefits to society;
>
> (d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; . . ..

Executive Order 12,291, §§ 2(a)-(d). Moreover, for all "major rules," like the revised HCS, agencies are required to prepare and



submit for OMB's review a Regulatory Impact Analysis, in which the agency justifies the regulation on cost/benefit grounds and describes "alternative approaches that could substantially achieve the same regulatory goal at lower cost, together with an analysis of the potential benefits and costs and a brief explanation of the legal reasons why such alternatives, if proposed, could not be adopted." §§ 3(c)(3)(d)(2)-(5).

Following its review, OMB can either approve the regulation or require the agency to respond to the concerns that it has identified. However, an agency is not permitted to publish any proposed or final rule until it satisfactorily responds to all of the objections raised by OMB, § 3(f)(2), which gives OMB considerable power to press agencies to modify any regulatory action that is, in OMB's view, incompatible with the requirements of the Order.

The Third Circuit's ruling will have no impact on OMB's plenary authority under Executive Orders 12,291 and 12,498 to review any information collection and dissemination activities imposed by an Executive Branch agency. Thus, OMB's basic objection to OSHA's decision to apply the revised HCS to multi-employer worksites was that it "does not appear to be the least burdensome [way] necessary for the efficient transmittal of hazard information . . .." Pet. App. 32a; *see also* Pet. at 14. But in the normal course, OMB would have raised this precise objection under the Executive Orders long before its responsibilities under the PRA were triggered, since OSHA's rule is, in OMB's view, incompatible with the cost/benefit criteria articulated in Executive Order 12,291, § 2, *see also* Executive Order 12,498, § 3(3)(d)(incorporating the standards set forth in § 2 of Executive Order 12,291 by reference), and at odds with OSHA's duty to explore less costly alternatives, as required by Executive Order 12,291, § 3(c)(3)(d)(4).

As is evident, this case does not present the grave situation depicted by petitioners. OMB has a broad array of powers under

which it supervises and controls every facet of an Executive Branch agency's exercise of authority, including those involving information collection and dissemination, regardless of whether the Third Circuit's construction of the PRA is allowed to stand. Accordingly, review by this Court is not warranted.

## CONCLUSION

For the reasons stated above, and in the separate opposition filed by the Steelworkers, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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